SAS INTERNATIONAL MONEY SDN BHD v. PP

HIGH COURT MALAYA, ALOR SETAR
CHOO KAH SING JC
[CRIMINAL APPEAL NO: 42S-10-12-2013]
5 MARCH 2015

CRIMINAL LAW: *Money-Changing Act 1998 – Sections 4(1) & 48(1) – Carrying on money-changing business without licence – Whether money-changing transaction took place between agent provocateur and first appellant's staff (perpetrator) – Whether ingredients of charge proved – Whether prosecution failed to produce perpetrator as witness – Whether perpetrator acted on her own volition – Whether wrongful act committed in usual course of business – Whether testimony of perpetrator obtained – Whether there was gap in prosecution's case – Whether charge against director proved – Whether reasonable doubt raised in prosecution's case*

EVIDENCE: *Burden of proof – Prosecution's burden – Carrying on money-changing business without licence – Failure to call perpetrator as witness – Whether created gap in prosecution's case – Whether burden fell on appellants to adduce proof in support of their defence – Whether ingredients of offence proved – Whether prosecution proved its case beyond reasonable doubt – Money-Changing Act 1998, ss. 4(1) & 48(1)*

SAS International Money Sdn Bhd ('the first appellant') and its director, Sheikh Abdullah bin P Sikandar ('the second appellant') were charged separately in the Sessions Court. *Vide* this appeal, the two suits were treated as one appeal and heard together. The prosecution's case was premised on the incident which occurred on 25 October 2011. On the day of incident, SP7 and SP8, both being officers from the Central Bank of Malaysia, acted as agent provocateurs and dealt with a staff named Syakira in the first appellant's premises. It was contended that money-changing transactions for Thai Bhat currency had taken place between SP7 and Syakira and a receipt for the said transaction was issued by the latter. SP8, however, alleged that he and SP7 left the premises when Syakira informed them that she had run out of Thai Bhat for exchange. Several minutes later, the premises was raided. In the Sessions Court, the first appellant was charged under s. 4(1) of the Money-Changing Act 1998 ('Act 577') for carrying on money-changing business without a license granted by the Central Bank of Malaysia and the second appellant was charged under s. 4(1) of Act 577 read together with s. 48(1) of the same Act. The prosecution contended that the appellants were not licensed by the Central Bank of Malaysia to carry on money-changing business. The second appellant, however, submitted that he had given strict instruction to Syakira not to entertain anyone who wanted to exchange foreign currency at the first appellant's premises. Further, the defence submitted that Syakira could have performed the money-changing

transaction on her own volition due to SP7's persistence. Based on the testimonies of SP7 and SP8, the trial judge decided that the first ingredient of the offence, *ie*, the fact that the first appellant had carried on money-changing business had been proved. Being a body corporate, the first appellant was punished with a fine of RM10,000 while the second appellant was punished with a fine of RM40,000 and six months' imprisonment if in default. Dissatisfied, the appellants appealed to the High Court and the prosecution cross-appealed for the court to impose a heavier sentence against the appellants. The issues that arose for determination were in relation to the failure of the prosecution to call Syakira as a witness and the quantum of proof in the appellant's case.

Held (acquitting and discharging appellants; setting aside decision of Sessions Court):

(1) The onus of proof lies with the prosecution throughout the case to prove beyond reasonable doubt the guilt of the accused for the offence charged. The evidence of the prosecution's case has to be nothing that falls short of proving the guilt of the accused whether at the close of the prosecution's case or at the close of the defence case (*Nagappan Kuppusamy v. PP*; refd). (para 20)

(2) In order for a body corporate to be liable for an offence charged under s. 4 of Act 577, the wrongful act (the changing of the money) could only be possible if it was carried out by an individual person. This person could be the owner of the body corporate or a person under engagement to act on behalf of the body corporate, such as an employee, agent or representative. The wrongful act had to be carried out by a perpetrator from the body corporate. The perpetrator must have carried out the wrongful act in his/her usual course of engagement by the body corporate. If an individual acted on his/her own frolic or out of the scope of work, this may well be a good reason to suggest that the body corporate could not have committed the offence of carrying on the money-changing business without a license. (para 25)

(3) The onus lies with the prosecution to prove that the perpetrator had acted under the instruction and acted on behalf of the body corporate and that the wrongful act was committed in the usual course of business. The best evidence to prove this fact should be the testimony of the perpetrator. The testimony of the perpetrator would be important to connect the body corporate to the offence under s. 4 of Act 577. The absence of such evidence would leave a gap in the prosecution's case that the body corporate had actually carried on money-changing business without a license at the material time. The gap becomes more apparent when the defence raises questions that the perpetrator could have acted out of the ambit of the authority given. In such instances, the testimony of the perpetrator becomes critical in the prosecution's case. (para 25)

(4) In dangerous drugs cases, the evidence of an agent provocateur was accorded with a special position in law by virtue of s. 40A of the Dangerous Drugs Act 1952. However, there is no provision in Act 577 that accords the evidence of an agent provocateur in an illegal money-changing case with such special position. The pertinent issue for the prosecution to establish was the nexus of the wrongful act and the first appellant. The required evidence here goes to the fact of proving one of the ingredients of the offence under s. 4 of Act 577 (*Losali v. PP*; dist). (para 26)

(5) The perpetrator in this case was Syakira. In the absence of Syakira's evidence, there was a gap in the prosecution's case. Her testimony was required in the prosecution's case to fill the gap between the nexus of the prosecution's version and the guilt of the first appellant. It was unsafe for the trial judge to rely totally on the testimonies of SP7 and SP8 to conclude that the first appellant had committed the offence as charged. The evidence of SP7 and SP8 had been tainted with doubts. It was necessary for the prosecution to remove the doubts in its case by calling Syakira to give evidence to counter the doubts raised in its case. (paras 27, 32 & 33)

(6) When a trial judge finds a *prima facie* case had been established, it means that the ingredients of the offence had been proved and if the accused elects to remain silent, the trial judge had no option but to convict the accused. On the facts, the first ingredient of the offence was not proved. On this ground alone, the trial judge should not have called the appellants to enter their defence. (para 34)

(7) The trial judge misdirected himself on the quantum of proof by placing the burden on the appellants to adduce proof in support of their defence. The first appellant was required to raise a reasonable doubt. The second appellant was placed with a burden and the burden only shifts to the second appellant in the event the offence under s. 4 of Act 577 had been proved. A body corporate is a fictitious person recognised in law as having a legal entity. Its functions could only be carried out by individual persons. In this case, the offence under s. 48(1) of Act 577 rides on s. 4 of the same Act. In the event the ingredients under s. 4 were not proved, then the charge against the second appellant should fail. (paras 37 & 38)

(8) Syakira could not be found to give evidence in the prosecution's case. The second appellant's right to discharge his burden on a balance of probabilities had been compromised. However, the first appellant had raised a doubt in the prosecution's case. Likewise, the second appellant had discharged his burden on a balance of probabilities that Syakira could have done the wrongful act on her own volition. (para 39)

(9) The appellants' version was consistent throughout the whole trial. Therefore, it was prudent for the prosecution to rebut the appellants' version that Syakira had acted on her own volition. On a balance of probabilities, the second appellant had discharged that burden in his defence. The prosecution failed to rebut the second appellant's version due to its failure to call Syakira. Further, it was unjust and wrong for the prosecution to offer Syakira as a witness to the appellants when the prosecution could not locate and produce her in the first place. When there was a gap in the prosecution's case, it was not the duty of the accused to fill the gap and to justify the defence version. As such, the prosecution had failed to prove the guilt of the appellants beyond a reasonable doubt for the offence charged. (paras 41-43)

[Editor's note: The Money-Changing Act 1998 has been repealed by the Money Services Business Act 2011].

Case(s) referred to:
Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Losali v. PP [2012] 2 CLJ 178 CA ***(dist)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohan Singh Lachman Singh v. PP [2002] 3 CLJ 293 CA ***(refd)***
Nagappan Kuppusamy v. PP [1988] 1 CLJ 283; [1988] 1 CLJ (Rep) 229 SC ***(refd)***
PP v. Asnawi Yusuf [2012] 3 CLJ 41 CA ***(refd)***
PP v. Mohamed Halipah Adan [1981] CLJ 92; [1981] CLJ (Rep) 238 HC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 115 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173(h)(i)
Dangerous Drugs Act 1952, s. 40A
Money-Changing Act 1998, ss. 4(1), (2), 7, 47, 48(1)

For the prosecution - Nuur Fakhizaa Abu Bakar; DPP
For the appellants - Rahmatullah Baharudeen; M/s Rahamat & Mashuri

[Appeal from Sessions Court, Alor Setar; Arrest Case No: 63-15-08-2012]

Reported by Kumitha Abd Majid

JUDGMENT

Choo Kah Sing JC

Introduction

[1] SAS International Money Sdn Bhd is a company incorporated in Malaysia, and Sheikh Abdullah bin P Sikandar is the director of SAS International Money Sdn Bhd. For convenience of reference, SAS International Money Sdn Bhd shall be referred to as the first appellant; whereas, Sheikh Abdullah bin P Sikandar shall be referred to as the second

appellant. Both appellants were charged separately at the Sessions Court and the cases against them had different case reference numbers. Both cases were heard together. On appeal, they were treated as one appeal with a single appeal case number and heard together as well.

[2] The first appellant was charged under s. 4(1) of the Money-Changing Act 1998 (Act 577) (Act 577 has been repealed by the Money Services Business Act 2011 on 1 December 2011) in that it had carried on money-changing business without a licence granted by the Central Bank of Malaysia (BNM) under s. 7 of the same Act. The first appellant was convicted of the offence charged. The offence, punishable under s. 4(2) of the same Act, carries a fine not exceeding one hundred thousand ringgit or imprisonment for a term not exceeding five years or both. Section 47 of the same Act states that imprisonment shall not apply if the offence in the Act was committed by a body corporate. As such, the first appellant being a body corporate was punished with a fine of RM10,000 by the Sessions Court on 13 November 2013.

[3] The second appellant, being the director of the first appellant, was also charged under s. 4(1) of Act 577 read together with s. 48(1) of the same Act, which states that a director is deemed to have committed the same offence that was committed by the body corporate if the body corporate is found guilty of the offence charged. The second appellant was convicted of the offence charged and punished with a fine of RM40,000, and six months imprisonment if in default. The appellants paid the fines.

[4] The appellants were not satisfied with their convictions and sentences and filed their appeals to the High Court. The prosecution filed cross-appeals urging this High Court to impose a heavier sentence against the appellants. The appeals were heard and argued before me. On 9 February 2015, this court set aside the learned Sessions Court Judge's decisions dated 13 November 2013 and held that the appellants be discharged and acquitted for the offences charged, consequently, the prosecution's cross-appeals were dismissed. Below are the reasons for my decision.

The Salient Facts

[5] On 25 October 2011, on or around 10am, two officers from BNM, SP 7 and SP 8, acting as agent provocateurs, went to the premises of the first appellant at Lot G20, Kompleks MBAS, Jalan Kota, 05000, Alor Setar. At the said premises, SP 7 spoke to a female staff at the counter who was later identified by the name of "Syakira". It was alleged that Syakira told SP 7 that the exchange rate for 100 Thai Baht in Ringgit Malaysia (RM) was RM10.25. SP 7 gave a marked RM50 note to Syakira in exchange for 460 Thai Baht. It was alleged that Syakira had issued SP 7 a purported receipt for the transaction. SP 7 was unable to exchange more Thai Baht

because it was alleged that Syakira had run out of Thai Baht currency. SP 8 was present and wanted to change Thai Baht as well, but was unable to do so since Syakira had run out of it. SP 7 and SP 8 then left the premises. Several minutes later, SP 3, the raiding officer (RO) together with SP 4, SP 7 and SP 8 went to the first appellant's premises and raided the premises. The appellants were charged in the Sessions Court of Alor Setar. Both pleaded not guilty and claimed trial.

The Prosecution's Case

[6] The prosecution called 12 witnesses. The main evidence of the prosecution's case came from SP 3, SP 4, SP 7 SP 8 and SP 12. SP 12 was the Investigating Officer (IO).

[7] The prosecution established that the appellants were not licensed by BNM to carry on money changing business through the evidence of SP 1, an officer from BNM.

[8] SP 2, an officer from the Companies Commission of Malaysia, Kedah Branch, testified that the second appellant was at that material time the director of the first appellant.

[9] SP 3 and SP 4, both BNM officers, narrated the background facts leading to the investigation as well as what had transpired when they raided the first appellant's premises. The items seized during the raid were tendered in court through SP 3 and SP 4.

[10] SP 5, an officer from Bank Islam, testified that the currency seized at the premises were genuine and valid. SP 6, an officer from the local council, testified and confirmed that the first appellant had rented the premises.

[11] SP 7 testified during examination-in-chief that he went to the first appellant's premises and requested a girl at the counter, known as "Syakira", to exchange RM to Thai Baht. He received 460 Thai Baht for RM50. Syakira issued him a purported receipt.

[12] The prosecution attempted to tender the purported receipt as prosecution's exhibit, but it was objected by the defence counsel. The defence counsel argued that the purported receipt was issued by Syakira, not SP 7. It should be admitted through Syakira, argued the defence counsel. The purported receipt was then marked as "ID38". The judge remarked: "Saya tangguhkan keputusan sehingga akhir kes pendakwaan. Sekiranya saya puas hati mungkin boleh ditandakan sebagai exhibit" (see p. 122 Appeal Records). The prosecution, once again, attempted to tender "ID38". This time it was through SP 12. Again it was objected by the defence counsel (see p.163 Appeal Records). The exhibit was eventually admitted and marked as "P38".

[13] SP 8 testified that he saw Syakira pass the purported receipt to SP 7. He and SP 7 left the premises when they found out that there was no more Thai Baht for exchange (see p. 133 of Appeal Records).

[14] SP 9, SP 10 and SP 11 were laymen. They testified with regard to their past dealings of exchanging foreign currency at the first appellant's premises.

[15] SP 12, the IO, narrated the entire investigation and the prosecution's version of the case.

[16] At the close of the prosecution case, the learned judge found the prosecution had established a *prima facie* case against the appellants, and pursuant to s. 173(h)(i) of the Criminal Procedure Code (CPC), the learned judge ordered the appellants to enter on their defence.

The Appellants' Defence

[17] The main thrust of the appellants' defence was that the first appellant at that material time was carrying on the business of selling and buying old currency, including old coins, which were no longer a legal tender *per se*. The second appellant denied using the first appellant to carry on any money changing business at that material time, although he had previously been involved in the money changing business *via* another company which had a licence to do so. Since the licence had expired and was not renewed, he formed the first appellant to carry on selling and buying old currency while waiting for BNM's reply to his appeal, hoping that BNM will grant him a money-changing licence.

[18] The second appellant raised the defence that he had given strict instruction to Syakira not to entertain anyone who wanted to exchange foreign currency at the first appellant's premises. The appellants also raised the defence that he had no knowledge Syakira had exchanged the Thai Baht with SP 7. The appellants also testified SP 7 had insisted on Syakira exchanging the marked RM50 to Thai Baht despite Syakira having told him to go elsewhere. Due to SP 7's persistence, Syakira could have exchanged the Thai Baht on her own volition.

The Findings Of The Court

[19] The appellants raised several grounds of appeal. Broadly speaking, there are only two pertinent grounds which warrant serious consideration, namely, the failure to call Syakira in the prosecution's case and what the quantum of proof in the appellants' case was.

The Failure To Call Syakira As Prosecution Witness In The Prosecution's Case

[20] It is trite law that the onus of proof lies with the prosecution throughout the case to prove beyond reasonable doubt the guilt of the accused for the offence charged. The evidence of the prosecution's case has

to be nothing that falls short of proving the guilt of the accused whether at the close of the prosecution's case or at the close of the defence case. If upon the whole evidence the court is left in a real state of doubt, the prosecution is said to have failed to satisfy the onus of proof which lies upon it (see *Nagappan Kuppusamy v. PP* [1988] 1 CLJ 283; [1988] 1 CLJ (Rep) 229; [1988] 2 MLJ 53, at p. 231 (CLJ); p. 54 (MLJ)).

[21] In this instant case, the learned Sessions Judge stated that the ingredients of the offence charged (s. 4 of the said Act 577) are as follows:

1. SAS International Money Sdn Bhd telah menjalankan perniagaan pengurupan wang.
2. SAS International Money Sdn Bhd tidak mempunyai lesen pengurupan wang yang diberikan di bawah s. 7 Akta Pengurupan Wang 1998 (Akta 577) pada masa dan tarikh yang dinyatakan di dalam pertuduhan.
3. OKT Sheikh Abdullah bin P Sikandar adalah pengarah SAS Internatinal Money Sdn Bhd pada masa dan tarikh yang dinyatakan di dalam pertuduhan. (see p. 21 of the supplemental appeal records [Rekod Rayuan Tambahan])

[22] The second and third ingredients were not challenged and were proved. In regard to the first ingredient, the learned judge in his judgment (at p. 21 of the supplemental appeal records) stated as follows:

> Melalui keterangan SP 7 dan SP 8 pihak pendakwaan telah berjaya membuktikan bahawa masa dan tarikh yang dinyatakan di dalam pertuduhan OKS iaitu SAS International Money Sdn Bhd telah menjalankan perniagaan pengurupan wang.

[23] The learned judge went on to reiterate the testimony of SP 7 and SP 8. Based on the evidence of SP 7 and SP 8, the learned judge was convinced that the first ingredient of the offence was proved. He relied on the fact that since SP 7 had successfully exchanged the Thai Baht at the first appellant's premises, and the said Thai Baht was confirmed by SP 5 as a genuine legal tender, this was sufficient to prove the first appellant had carried on money-changing business (menjalankan perniagaan pengurupan wang).

[24] This court begs to differ with the learned Sessions Court Judge's finding that the first ingredient of the offence had been proved at the close of the prosecution case.

[25] For a body corporate to be liable for an offence charged under s. 4 of the said Act 577, the wrongful act (the changing of the money) could only be possible if it was carried out by an individual person. This person could be the owner of the body corporate or a person under engagement to act on behalf of the body corporate, such as an employee,

agent or representative. In other words, the wrongful act has to be carried out by a perpetrator from the body corporate. The perpetrator must have had carried out the wrongful act in his/her usual course of engagement by the body corporate. If an individual acted on his/her own frolic or out of the scope of work this may well be a good reason to suggest the body corporate could not have committed the offence of carry on changing money business without a licence. Likewise, money-changing has to be a business of the accused charged. The mere fact that money is exchanged could not by itself be a wrong within s. 4 of the said Act 577, it had to be done in the usual course of business. Hence, the onus lies with the prosecution to prove that the perpetrator had acted under the instruction and had acted on behalf of the body corporate and that the wrongful act was committed in the usual course of business of the accused. The best evidence to prove this fact should be the testimony of the perpetrator. The testimony of the perpetrator would be important to connect the body corporate to the offence under s. 4 of the said Act 577. It is my considered view that the absence of such evidence in the prosecution case would leave a gap in the prosecution's case that the body corporate at that material time had actually carried on money changing business (without a licence). The gap becomes more apparent when the defence raises questions that the perpetrator could have had acted out of the ambit of authority given. In such instances, the testimony of the perpetrator becomes critical in the prosecution case.

[26] The Court of Appeal in the case of *Losali v. PP* [2012] 2 CLJ 178 held that evidence of an agent provocateur can stand alone without corroboration. The Court of Appeal referred to the case of *PP v. Mohamed Halipah Adnan* [1981] CLJ 92; [1981] CLJ (Rep) 238. This proposition, in my considered view, is not applicable in this instant case. First, it is only in a dangerous drugs case that the evidence of an agent provocateur is accorded with a special position in law by virtue of s. 40A of the Dangerous Drugs Act 1952. Section 40 of the DDA 1952 provides that no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under the Act if attempt to abet or abetment was for the sole purpose of securing evidence against such person. In this instant case, there is no provision in the said Act 577 that accords the evidence of an agent provocateur in an illegal money-changing case with such special position. Secondly, in this instant case, the pertinent issue for the prosecution to establish is the nexus of the wrongful act and the first appellant. The required evidence here goes to the fact of proving one of the ingredients of the offence in s. 4 of the said Act 577.

[27] In this instant case, the perpetrator would be Syakira. The defence counsel put to SP 7 that Syakira did not issue him a receipt (P38), and he answered in the negative. SP 7 was then asked that if a receipt was issued by Syakira, she did it on her own initiative and without the knowledge of the second appellant, SP 7 answered "I do not know". When it was suggested to SP 7 that whether Syakira did it on her own initiative or not could only be determined by the testimony of Syakira, SP 7 answered "Yes" (see p. 127 appeal records). SP 7 also agreed that there was no evidence to prove that he received the money (Thai Baht) from Syakira (see p. 128 appeal records). However, under re-examination, SP 7 said that Syakira could confirm he received the money (Thai Baht) from her and another colleague could also confirm that as well.

[28] SP 8, in examination in chief, testified that he saw Syakira gave the receipt to SP 7 (see p. 133 appeal records). In cross-examination, it was put to SP 8 that whether or not Syakira exchanged the money (Thai Baht) with SP 7 could only be determined by Syakira, he answered "I do not know". SP 8 was not sure whether Syakira did it on her own initiative or not and that could only be determined by the testimony of Syakira. SP 8 was also not sure whether or not the receipt was issued by Syakira and that could only be determined by Syakira herself. SP 8 had testified earlier that he saw Syakira gave the receipt to SP 7, and yet in cross-examination, he seemed to be evasive in answering questions.

[29] The court finds the evidence of SP 12, the IO, is a credible and truthful witness. SP 12 admitted that the evidence of Syakira in this case was very important (see p. 171 appeal records). He also admitted that if he failed to record statements from the witnesses involved in the case, this means that he has failed to carry out his duty properly (see p. 171 appeal records). He also admitted that he did not know there were three more persons working at the first appellant's premises besides Syakira. When the defence counsel put the question to SP 12 as follows:

> Saya katakan hanya Syakira sahaja yang boleh sahkan pertukaran wang ada dibuat. Isu ini hanya boleh dijelaskan oleh Syakira?

SP 12 answered in the affirmative (see p. 173 appeal records).

[30] The defence counsel raised the issue that it was only after SP 7 had insisted that Syakira exchange the money for him that she did it. These were the two questions asked:

> Dan ekoran dari desakan inilah Syakira telah buat tukaran atas inisiatif beliau sendiri tanpa apa-apa pengetahuan OKT, kamu tahu atau tidak?
>
> Saya tidak tahu.
>
> Dan saya katakan bahawa perkara mengenai desakan ini boleh disahkan oleh Syakira kalau dia ada?
>
> Ya, setuju. (see p. 174 appeal records)

[31] The prosecution did not call Syakira to testify in its case because SP 12 explained that he was unable to locate the whereabouts of Syakira despite several attempts made to contact her (see p. 166-7 appeal records).

[32] In the prosecution case, the defence counsel had raised a doubt in the evidence of SP 7 and SP 8 as to whether Syakira committed the wrongful act on her own volition or not. Inevitably, that doubt could have been explained through the testimony of Syakira. In the absence of Syakira's evidence, there is clearly a gap in the prosecution's case. There is a missing link in the nexus of the offence charged and the first appellant. If Syakira were to give evidence in court, her evidence would clear the air. However, it could go either way. The evidence of Syakira was therefore crucial in this circumstance. Her testimony was required in the prosecution's case to fill the gap between the nexus of the prosecution's story and the guilt of the first appellant. It is my considered view that her evidence is so material that the absence of her testimony in court would leave a serious gap in the prosecution's case.

[33] The upshot of this missing link which is the nexus of the offence charged and the guilt of the first appellant would result that the first ingredient of the offence charged was not proved. It is unsafe for the trial judge to rely totally on the testimonies of SP 7 and SP 8 to conclude that first appellant had committed the offence as charged. The evidence of SP 7 and SP 8 has been tainted with doubt by the questions raised by the defence counsel. It was necessary for the prosecution to remove the doubt in its case by calling Syakira to give evidence to counter the doubt raised in its case. The burden always lies with the prosecution to prove its case. The prosecution has failed to do so.

[34] When a trial judge finds a *prima facie* case has been established, this means the ingredients of the offence has been proven, and if the accused elects to remain silent, the trial judge has no option but to convict the accused (see *Balachandran v. PP* [2005] 1 CLJ 85). In this instant case, it is my considered view that the first ingredient was not proved. As such, on this ground alone, the trial judge should not have called the appellants to enter defence.

The Quantum Of Proof In The Appellants' Case

[35] At the close of the defence case, the learned trial judge stated as follows:

> Penafian OKT bahawa transaksi perniagaan/pertukaran wang jika sekalipun berlaku pada tarikh seperti yang dinyatakan di dalam pertuduhan adalah inisiatif yang di lakukan sendiri oleh Syakira tanpa kebenaran OKT adalah tidak dapat diterima oleh mahkamah memandangkan pihak pembelaan gagal mengemukakan bukti untuk menyokong dakwaan pihak pembelaan tersebut. (see p. 238 of the appeal records)

[36] It is trite law that an accused is presumed innocent until proven guilty and he bears no legal burden to prove his innocence. To earn an acquittal, all he needs to do is to cast a reasonable doubt in the prosecution case. In *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169, the then Supreme Court held:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt?

[37] The above passage from the apex court suffices to show that the trial judge has misdirected himself on the quantum of proof by placing on the appellants a burden to adduce proof in support of their defence. As far as the first appellant is concerned, all that was required from it was to raise a reasonable doubt in its defence. As for the second appellant, there was a burden placed on him. The burden only shifts to the second appellant in the event the offence of s. 4 of Act 577 has been proven. The second appellant was charged under s. 4 read together with s. 48(1) of the same Act 577 which states as follows:

> Where an offence under this Act has been committed by a body corporate, any person who at the time of the commission of the offence was a director, or an officer, who in any manner has control of the money-changing business of the body corporate, or who was purporting to act in any such capacity, shall be deemed to have committed that offence and be punished accordingly unless he proves that the offence was committed without his consent or connivance and that he exercised such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his function in that capacity and to all the circumstances.

[38] The burden placed on the second appellant in s. 48(1) of the Act 577 is on a balance of probabilities (see *PP v. Yuvaraj* [1968] 1 LNS 115; [1969] 2 MLJ 89). Section 48(1) of Act 577 states if an offence under this Act has been committed by a body corporate, this means the offence could only be committed through a perpetrator - an individual person, as explained earlier. A body corporate is a fictitious person recognised in law as having a legal entity. Its functions could only be carried out by individual persons. If there is any wrong committed, it has to be done through an individual. In this particular case, the offence of s. 48(1) of Act 577 rides on s. 4 of the same Act. In the event the ingredients of section 4 of the said Act 577 are not proved, it follows that the charge against second appellant should fail.

[39] The offence under s. 4 of the said Act 577 was alleged to have been committed by first appellant through Syakira. Unfortunately, Syakira could not be found to give evidence in the prosecution case. The second appellant's right to discharge his burden on a balance of probabilities had been compromised. However, in my opinion, the first appellant had raised a doubt in the prosecution's case. Likewise, the second appellant had discharged his burden on a balance of probabilities that Syakira could have done the wrongful act on her own volition.

[40] In the appellants' case, two witnesses were called, the second appellant and one Siyakulusen Ayyub Khan (SD 2), a former employee of the first appellant. SD 2 testified that as long as he could remember, the first appellant did not carry on money-changing business (while he was working as an employee of the first appellant). The material parts of SD 2's testimony is reproduced as below:

> Arahan yang saya terima ketika saya masuk kerja di situ pada bulan 8, ialah premis itu hanya jual mata wang lama dan syiling lama dan tiada apa-apa pertukaran mata wang lain.
>
> Kejadian berlaku pada 25.10.2011 jam 11 pagi dan ketika itu saya dengan 3 orang lagi, berada dalam premis, ada dua orang yang saya tidak kenal datang dan pergi terus ke kaunter dan mereka berbicara dengan Syakira saya kurang jelas dengar, dan mereka seolah-olah memaksa Syakira untuk tukar wang Thai Baht jumlah RM2,000.00, saya kurang dengar tetapi Syakira maklumkan dia tidak ada Thai Baht dalam kuantiti sebanyak itu, dan premis itu tidak menyimpan mata wang dalam kuantiti yang mereka hendak. Memang premis itu tidak menyimpan dan keluarkan mata wang asing. Iaitu tidak berlaku transaksi mata wang asing. Tapi dua orang itu seolah-olah mereka terdesak dan nak juga, sebanyak mana yang ada di orang nak juga, sebab mereka kata dia orang luar dan tidak tahu premis lain di Alor Setar.
>
> Saya dengar Syakira kata dia tiada duit yang mereka hendak itu. Itu sahaja yang saya dengar. Cuma saya dengar Syakira kata tidak ada. Tapi dua orang itu kata mereka nak juga walaupun sedikit.
>
> Q : Ada Syakira beritahu apa-apa kepada mereka?
>
> Tidak.
>
> Q : Ada dia menyarankan apa-apa?
>
> Dia menyarankan untuk pergi ke Pekan Cina dan satu lagi di Tesco Mergong untuk menukarkan mata wang asing.
>
> Q : Kemudian apa mereka kata?
>
> Mereka cakap mereka adalah orang baru dan mereka tidak tahu jalan dan lain-lain.

A Q : Kemudian?

Saya lihat Syakira keluarkan beberapa keping dan beri kepada mereka. Saya tidak lihat dengan jelas beberapa jumlah kerana saya berada di luar kaunter. Dan kurang jelas. Tetapi saya masih berada di dalam premis.

B Q : Selepas itu?

Mereka ambil beberapa mata wang yang diberi oleh Syakira dan terus beredar dari situ. (see pp. 220-1 appeal records)

[41] The evidence of SD 2 was not rebutted. Clearly, in SD 2's testimony, the appellants had raised, on a balance of probabilities, that Syakira could have had acted on her own volition because of SP 7's persistence. The appellants' story was consistent throughout the whole trial. Therefore, it was prudent for the prosecution to rebut the appellants' story that Syakira had acted on her own volition. On a balance of probabilities, I am of the considered view that the second appellant had discharged that burden in his defence through his own testimony and SD 2's testimony. The failure to call Syakira in the prosecution's case had not only resulted in the prosecution failing to prove the first ingredient of the offence charged, and thereby created a gap in the prosecution case, it had also resulted in the prosecution failing to rebut the second appellant's story.

[42] It was unjust and wrong for the prosecution to offer Syakira as a witness to the appellants when the prosecution could not locate and produce her in the first place (see *PP v. Asnawi Yusuf* [2012] 3 CLJ 41). When there is a gap in the prosecution case, it is not the duty of the accused to fill the gap and to justify the defence story (see *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ Rep 19; [1985] 2 MLJ 16; *Mohan Singh Lachman Singh v. PP* [2002] 3 CLJ 293; [2002] 3 MLJ 291).

[43] Based on the above reasoning, the prosecution has, throughout the case, failed to prove beyond reasonable doubt the guilt of the appellants for the offence charged. The convictions of the appellants by the Sessions Court were miscarriages of justice. Hence, the appellants were discharged and acquitted by this court, and the decisions of the Sessions Court were set aside.